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Supreme Court of the United States.

Filed Dec 1, 1898.
JOHN J. WALSH.

No. 16901. vs.
THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY.

No. 16902. ROBERT WRIGHT, vs. THE SAME.

No. 16903. MICHAEL St. VOUGHT, vs. THE SAME.

ON MOTION TO DISMISS PETITION IN ERROR.

BRIEF OF PLAINTIFFS IN ERROR AGAINST SAID MOTION.

J. B. FORAKER,
T. E. POWELL,
D. J. RYAN,
Counsel for Plaintiffs in Error.

COLUMBUS:
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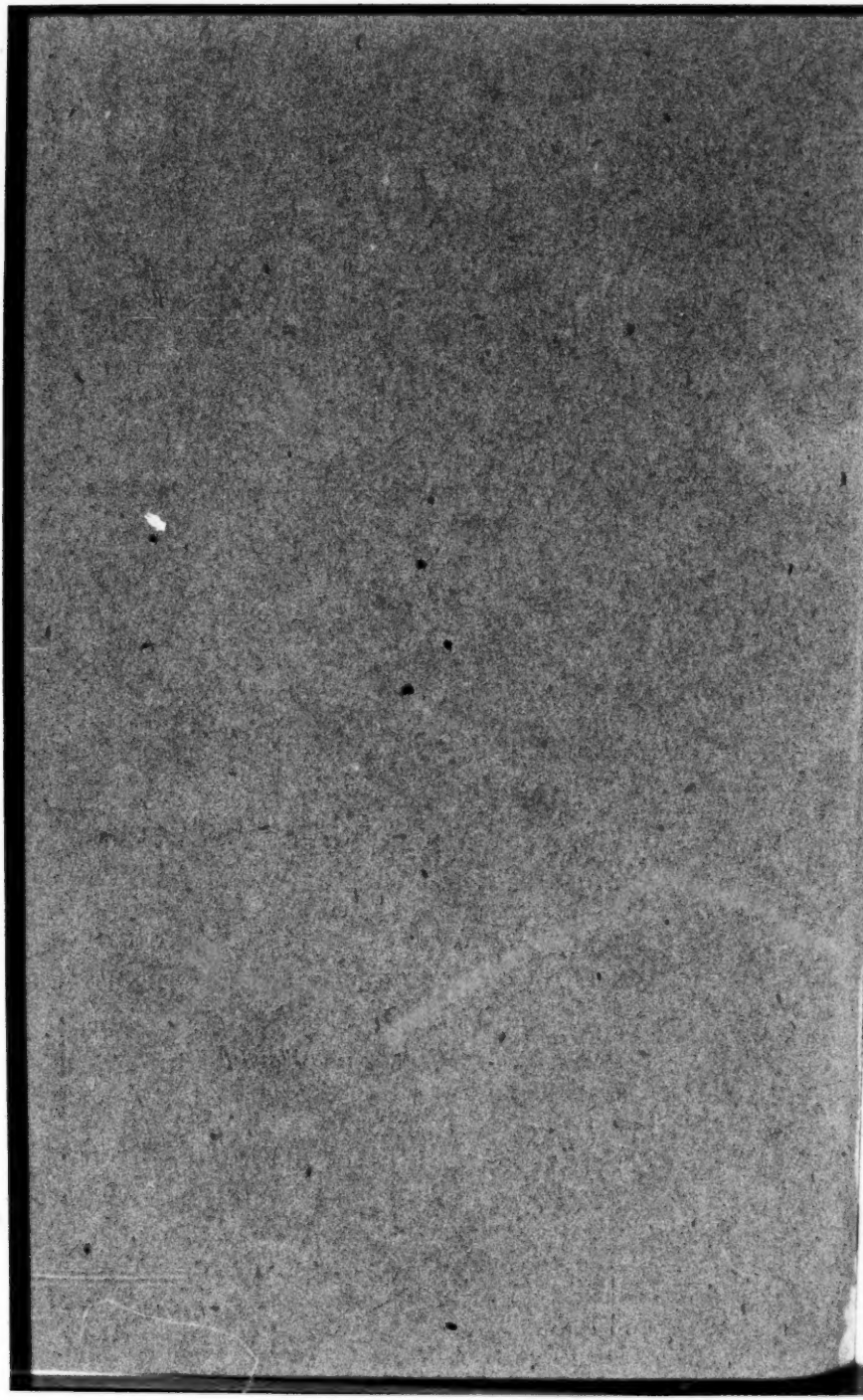

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JOHN J. WALSH,

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THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY.

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STATEMENT.

The defendant in error by its counsel moves the Court to dismiss the petitions in error in the above cases for want of jurisdiction.

The motion also sets forth six different grounds for dismissal, which grounds involve the consideration of the cases on their merits.

In addition, defendants in error move the Court to affirm the judgment of the State Court, for the reason it is claimed, that the writ of error herein was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

I.

AS TO JURISDICTION.

These cases involve a federal question growing out of the relations of the State of Ohio and the United States, resulting from the construction of the State canals.

The judicial power of the United States extends to all cases, among others, in law and equity arising under the constitution, the laws of the United States and the treaties made under their authority.

Constitution, Art. 3, Sec. 2.

To give the necessary effect to this provision it has been provided that a "a final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission or authority, may be re-examined, and reversed or affirmed in the Supreme Court (of the United States) on a writ of error."

Act of Sept. 24, 1789, as amended. Rev. Stat. U. S., Sec. 709.

This section includes all cases involving rights protected by the Federal Constitution, laws and treaties however created, and when a Federal question is clearly raised, there is jurisdiction, however frivolous the objection.

New Orleans v. *DeArmas*, 9 Pet., 224.
Hall v. *Jordan*, 15 Wall., 393.

In these cases there is drawn in question the validity of a statute of the State of Ohio, which was an act of its General Assembly, passed May 18, 1894, providing for the abandonment of certain canals in the State of Ohio, and the leasing of the same for railroad purposes. Reference is made to the record for the particulars thereof.

We contended in the State Court, that the statute referred to conflicts with Article I, Section 10, of the Constitution of the United States, which provides that "no State shall pass any bill impairing the obligation of contracts." By reference to the record it will be seen that it was also contended by plaintiffs in error that the canal referred to was constructed out of the proceeds of certain public lands granted to the State of Ohio by act of Congress, approved May 24, 1828, and that one of the conditions of the grant of said lands, as expressed in said act of Congress, was that said canals when completed or used should be and forever remain public highways for the use of the Government of the United States. This condition was accepted on part of the State of Ohio by the act of the General Assembly of said State, passed December 27, 1828.

It was claimed by plaintiffs in error that the law of Ohio which abandoned the canal in question and leased it for railroad purposes, was in violation of the compact which existed by virtue of the act of Congress, approved May 24,

1828, and act of the General Assembly of Ohio, passed December 22, 1828.

"When a writ of error is asked on the ground that a State law impairs the obligation of a contract, this Court must determine whether a contract exists, and what is its construction and obligation."

State Bank of Ohio v. *Knoop*, 16 How., 369.

"A Federal question arises when the allegation is that by statute a State made a contract, and by another violated it, and the State Court holds the later statute valid."

Binghampton v. *Bridge*, 3 Wall., 51.
Jefferson Bank v. *Skelly*, 1 Black., 436.
Bridge Proprietors v. *Hoboken Co.*, 1 Wall., 116.
Delmas v. *Insurance Company*, 14 Wall., 661.
University v. *People*, 99 U. S., 309.

Where the question raised is a Federal question, this Court will not sustain a motion to dismiss.

Spencer v. *Merchant*, 125 U. S., 345.

II.

AS TO DISMISSAL FOR OTHER REASONS ALLEGED.

The motion of the defendant in error also moves the Court to dismiss these actions not only because this Court has no jurisdiction, but for six other reasons, each and all of which involve the merits of the cases at bar.

This Court cannot decide the whole legal merits of a case on a motion to dismiss or quash the writ. In the case of *Hecker et al.* v. *Fowler*, 1 Black, 95, Chief Justice TANEY delivering the opinion of the Court, said:

"We are asked to dismiss this writ because no error appears on the face of the record. It is not necessary, by the practice of this Court, for the party who brings a cause here, to specify upon the record the errors he complains of, and they are not even informally brought to our notice until the argument is heard. Want of jurisdiction and irregularity of the writ are the only grounds for dismissal. Where a judgment appears to have been rendered which the party is entitled to have revised in this Court, and it is also seen that it comes here for such revision, upon proper process, duly issued, all other questions must await the final hearing. To say that there is no error in this judgment, and affirm it for that reason, would be to decide the whole legal merits of the case, and this we cannot do on a motion to dismiss or quash the writ."

And in the case of *Sparrow* v. *Strong*, 3 Wall, 97, it was held that on a motion to dismiss, the Court will look to the regularity of the writ and the fact of jurisdiction.

III.

AS TO MOTION FOR AFFIRMANCE.

The defendant in error also moves the Court to affirm the judgment and decree of the State Court, notwithstanding that this Court may have jurisdiction, for the following reasons:

(*a.*)—"That this writ of error was taken for delay only."

(*b.*)—"That the question on which the jurisdiction depends is so frivolous as not to need further argument."

As to delay.—It is clearly apparent from reference to the record in these cases, as shown by the docket of the clerk of the Supreme Court, that there has been no delay by the plaintiffs in error in their prosecution in this Court.

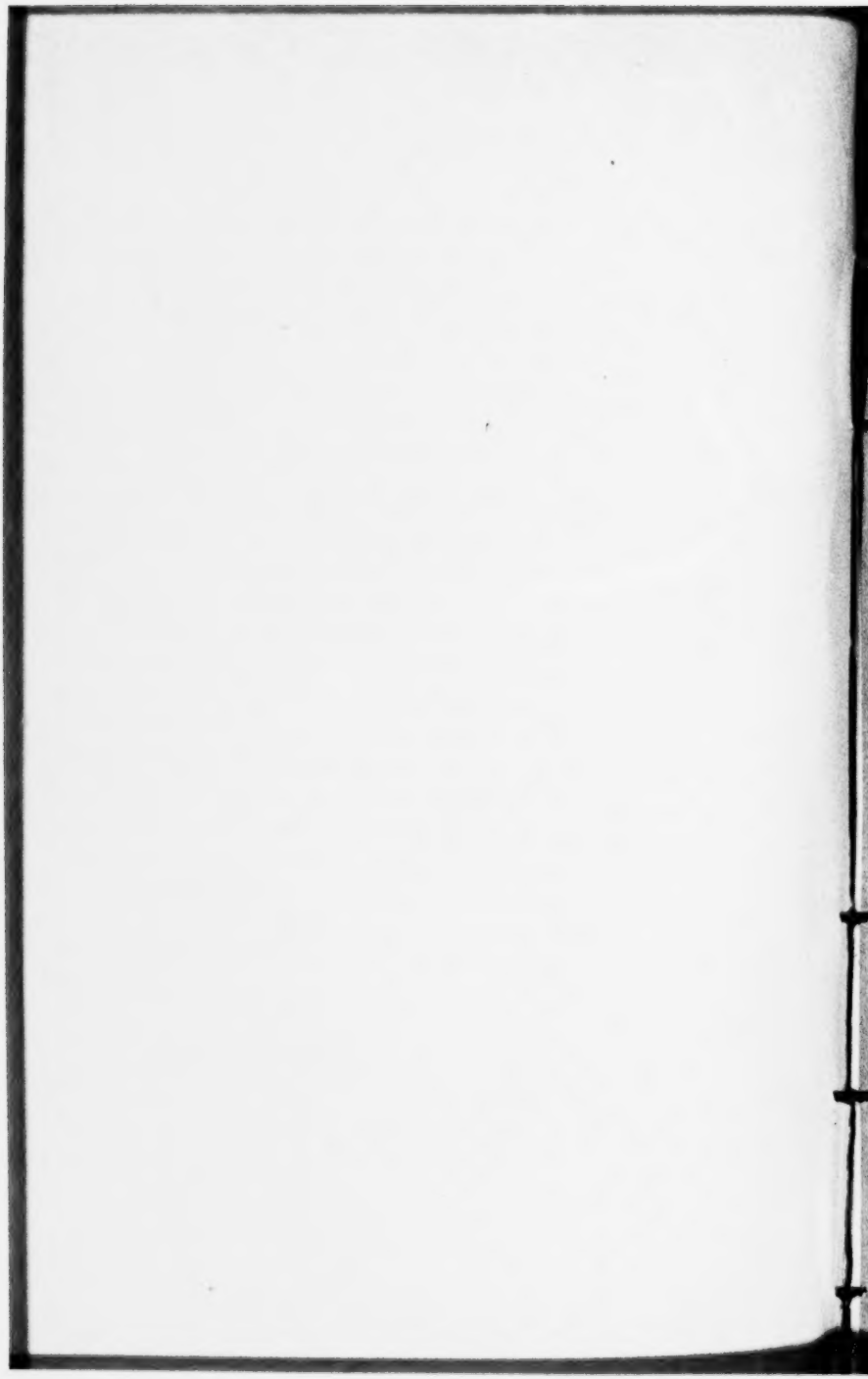
As to what may be regarded as delay or diligence, reference is made to the following cases:

Bingham v. *Morris*, 7 Cranch., 99.
Davidson v. *Lanier*, 4 Wall., 458.
United States v. *Virgil*, 10 Wall., 423.
Mesa v. *United States*, 2 Black, 721.
German v. *United States*, 5 Wall., 825.
Brooks v. *Norris*, 11 Howard, 204.

As to frivolty.—Suits which involve so grave a question as the right of a sovereign State to abandon its canals without the consent of the national government, cannot be said to be frivolous. Claims made by citizens of the United States that they have property rights which are injured or destroyed by reason of the violation of a compact which they claim exists between the United States and the State of Ohio, certainly are not frivolous. Suits which were deemed worthy of consideration by the Supreme Court of the State of Ohio; and in which, according to the record, its Chief Justice has certified that a federal question is involved, cannot certainly be declared to be frivolous.

The briefs filed by the counsel for the defendant in error upon this motion, combatting propositions raised in the petitions of the plaintiffs in error, are evidence themselves, that the controversy herein is not frivolous.

J. B. Foraker,
T. E. Powell,
D. J. Ryan,
Counsel for Plaintiffs in Error.



Brief of Plaintiffs for U. S.
SUPREME COURT OF THE UNITED STATES
Filed October 13, 1899.

Nos. 316.

JOHN J. WALSH

vs.

THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY.

No. 317.

ROBERT WHITE vs. THE SAME.

No. 318.

MICHAEL VOUGHT vs. THE SAME.

In Error to the Supreme Court of the State of Ohio.

Brief for Plaintiffs in Error.

J. B. FORAKER,
Of Counsel for Plaintiff in Error.

THE COURT CRIER PRESS.

SUPREME COURT OF THE UNITED STATES

JOHN J. WALSH *vs.* THE COLUMBUS, HOCKING VALLEY & ATHENS RAILROAD COMPANY.	No. 316.
ROBERT WRIGHT *vs.* THE SAME	No. 317.
MICHAEL S. VOUGHT *vs.* THE SAME.	No. 318.

In Error to the Supreme Court of the State of Ohio.

Brief for Plaintiffs in Error.

I.

There were a number of questions in these cases in the Courts below, but in this Court there is but one question and that is common to all these cases.

It is whether the act of the General Assembly of the state of Ohio, passed May 18th, 1894, violates the provision of Section 10, Article 1 of the Constitution of the United States, that "no state shall pass any bill impairing the obligation of contracts."

The following is a copy of the statute in question:

"S. B. AN ACT. No. 315.

"To provide for the abandonment of the Hocking Canal for canal purposes and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Company:

"SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the Hocking Canal, from its junction with the Ohio Canal in the village of Carroll, Fairfield county, to its southeastern terminus in the village of Nelsonville, Athens county, be, and the same hereby is abandoned for canal purposes, and the same shall not be used for canal purposes during the pending of the lease provided in the next section of this act.

"SEC. 2. There is hereby granted the right, franchise and privilege of constructing, maintaining and operating over, upon and along the Hocking Canal and property of the state of Ohio adjacent thereto, a railroad with single or double tracks, side tracks, switches, bridges, stations and other structures usual and incidental to the operation of a railroad, to the Columbus, Hocking Valley & Athens Railroad Company, its successors and assigns, for the term of ninety-nine years, renewable forever, for and in consideration of the payment by said company, its successors or assigns, to the Treasurer of the state of Ohio, on the first day of July, 1894, of the sum of fifty thousand dollars, and on the first day of January, 1900, and of each and every year thereafter, during the term of this lease, of the sum of ten thousand dollars annual rental.

"SEC. 3. Said installment of fifty thousand dollars shall be paid into the State Treasury before the construction of said railroad is begun, and for the remaining installments of rental the state of Ohio shall have the first lien upon said railroad, together with its switches, side tracks, bridges and other structures erected on said property of the state of Ohio, which shall be superior to any and all other liens of every kind upon the same. The said Columbus, Hocking Valley & Athens Railroad Company shall further execute unto the state of Ohio, to be approved by the Auditor of State, the Secretary of State, and Attorney General, or any two of them, a good and sufficient bond in the sum of one hundred thousand dollars, conditioned that the said company will faithfully build said railroad in compliance with the conditions and terms of this act, and upon failure to build said road within the time herein specified, they shall be liable to the state of Ohio in the full sum of one hundred thousand dollars as stipulated damages. Said bond shall be executed and filed with the Secretary of State within ten days after the passage of this act.

"SEC. 4. In consideration of the payment aforesaid, said railroad company, its successors and assigns, shall have the exclusive right during the term aforesaid to use and occupy the property

aforesaid, or so much thereof as may be necessary, for the purpose of constructing, maintaining and operating the railroad thereon. Said company shall not disturb any vested rights or privileges of abutting property holders along said canal, and shall hold the state harmless from all loss or damage resulting to such property holders by reason of the construction and operation of said railroad. Provided that when said railroad, its successors and assigns, cease to use said canal for railroad purposes, said canal property shall revert to the state for canal purposes.

"SEC. 5. This act shall not be construed to prevent the levying and collecting of taxes on said railroad in the same manner as they are levied and collected on other railroad property in this state.

"SEC. 6. The work of constructing said railroad shall be commenced within six months after the passage of this act, and the same shall be completed within two years thereafter.

"SEC. 7. This act shall take effect and be in force from and after its passage.

"LEONIDAS H. SOUTHARD,
"*Speaker pro tem. of the House of Representatives.*
"ANDREW L. HARRIS,
"*President of the Senate.*

"Passed May 18th, 1894."

The question as to the validity of this act arises as follows: On the 24th day of May, 1828, the Congress of the United States passed an act entitled "An Act to aid the State of Ohio in extending the Miami Canal from Dayton to Lake Erie, and to grant a quantity of land to said state to aid in the construction of said canals authorized by law," the fifth section of which act is in the words and figures following, to-wit:

"SEC. 5. And be it further enacted, That there be and hereby is granted to the state of Ohio five hundred thousand acres of land owned by the United States, within the said state of Ohio in the payment of the debt, or the interest thereon, which has heretofore been, or which may hereafter be, contracted by said state in the construction of the canals within the same, undertaken under the authority of the laws of the said state now in force, or that may hereafter be enacted, for the extensions of canals now making, which lands, when selected, shall be disposed of by the Legislature of Ohio, for that purpose and no other: provided, the said canals, when completed or used, shall be and forever remain, public highways, for the use of the Government of the United States free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same; and provided further, that the said canals, already commenced, shall be completed in seven years from the ap-

proval of this act, otherwise the state of Ohio shall stand bound to pay over to the United States the amount which any lands sold by her, within that time, may have brought; but the validity of the titles derived from the state by such sales shall not be affected by that failure."

It was further provided by the seventh section of said act that "said act shall take effect, provided the Legislature of Ohio, at the first session thereof hereafter to commence, shall express the assent of the state to the several provisions and conditions thereof; and unless such expression of assent be made, this act shall be wholly inoperative.

Afterward, on the 22d day of December, A. D., 1828, the General Assembly of the state of Ohio assented to the several provisions of said act by enacting the following:

"An Act declaring the assent of the state of Ohio to the provisions and conditions of an Act of Congress.

"SECTION 1. Be it enacted by the General Assembly of the state of Ohio, That the assent of the state of Ohio be, and the same is hereby expressed and declared to be given, to the several provisions and conditions of an act of Congress of the United States, approved twenty-fourth of May, eighteen hundred and twenty eight, and entitled 'An Act to aid the state of Ohio in extending the Miami Canal from Dayton to Lake Erie, and to grant a quantity of land to said state, to aid in the construction of the canals authorized by law; and for making donations of land to certain persons in Arkansas territory.'

"EDWARD KING,
"*Speaker of the House of Representatives.*
"SAMUEL WHEELER,
"*Speaker of the Senate.*

"December 22d, 1828."

In pursuance of said agreement so entered into between the Congress of the United States and the General Assembly of the state of Ohio, the state of Ohio received and took possession of the said grant of five hundred thousand acres of land provided for in said act of Congress, and it, from time to time, sold and disposed of the same, realizing therefrom proceeds to the amount of more than $2,200,000.00.

"The Hocking Canal" mentioned in the act of the General Assembly of Ohio, passed May 18th, 1894, was, as alleged in the petitions and admitted by the demurrers, a part of the Ohio canals

constructed by the state under the authority of the state duly enenacted for the extension of canals under construction at the time when the Congress of the United States passed the act of May 24th, 1828, and to the construction of which the funds arising from the sale of said grant of lands were applicable.

The record further shows that a part of the "Hocking Canal," to-wit: eight miles, extending from the village of Carroll to the city of Lancaster, was originally constructed by a company incorporated under the laws of Ohio, as the Lancaster Lateral Canal Company; but that the same was subsequently purchased from said company by the state of Ohio for the sum of $61,241.00, and that payment of this sum was made, in part at least, out of the funds arising from the sale of said public lands.

The remaining portion of the "Hocking Canal" here under consideration, to-wit: that portion extending from Lancaster to Nelsonville was constructed by the state of Ohio, and that the expenses of such construction were paid by the state, in part, at least, out of the funds arising from the sale of said public lands. In other words, the "Hocking Canal" affected by the act of the General Assembly of the state of Ohio, passed May 18th, 1894, was subject to all the terms and conditions applicable that were attached to the grant of said public lands by Section 5 of the act of the Congress of the United States, passed May 24th, 1828.

The petitioners are the owners of lands abutting upon this canal. These lands are prejudicially affected to the damage of their respective owners by the proposed abandonment of the canal. This is shown by the allegations of the several petitions, which are admitted by the demurrers, and the record discloses that the Supreme Court of Ohio has also made a finding to this effect and has, in the judgment it rendered, required the railroad company, defendant in error, to resort to condemnation before proceeding further. The plaintiffs claim that, by reason of this injury to their adjoining lands, they have a right to invoke the protection of the contract between the United States and the state of Ohio, with respect to the construction of this canal, found in the first proviso of the fifth section of the act of May 24th, 1828, as follows, to-wit: "Provided that said canals, when completed or used, shall be and forever re-

main, public highways, for the use of the Government of the United States free from any toll or charge whatever, for any propperty of the United States, or persons in their service passing along the same."

Differently stated, the plaintiffs in error claimed below, and claim here, that this proviso reqnires the state of Ohio to continue canals to which it is applicable, including the "Hocking Canal" so long as this contract between the United States and the state of Ohio shall continue in force, and that the plaintiffs in error had a right to rely upon such continuance of this canal by the state until there should be a legal and valid abandonment by the state with the consent of the United States, and that the abandonment provided for by the act of the General Assembly of Ohio, passed May 18th, 1894, was without such consent.

In support of this proposition, plaintiffs in error contend, that

1. The effect of the act passed by the Congress of the United States May 24th. 1828, and the subsequent act of acceptance passed by the General Assembly of Ohio, December, 22d, 1828, was to make a contract.

2. The contract so entered into between the United States and the state of Ohio was a contract on the part of the state for and in behalf of all the citizens of the state, and therefore a contract to which these plaintiffs in error were in privity.

3. This contract, like any other, can not be discharged except only by performance, or, in case of abandonment, by agreement, to which agreement both original contractors must be parties.

4. This contract being for the benefit of these plaintiffs in error in common with all the citizens of Ohio, they had a right to rely upon the maintenance of the canal until this contract should in some way be validly terminated, and they have a right because of their special damage to call in question, and put to the test of validity, any unauthorized or illegal attempt at abandonment.

5. They have in consequence a lawful right, not as strangers, but as parties to the contract, to impeach the constitutionality of the statute of Ohio providing for this abandonment. Having this right, they are entitled to the judgment prayed for in their petitions, on the ground that while, generally, the state has a right to abandon a canal without regard to the injury that may thereby

be inflicted upon the owners of water rights and privileges, yet that rule applies only where the abandonment is legal, and not, as here, in violation of contract obligations.

II.

It was contended in the Courts below that Section 5 of the act of Congress of May 24th, 1828, did not apply to this particular canal—the "Hocking Canal." If that claim should be made here, it is a sufficient answer, that it appears from the petition that the canal in question was undertaken under the authority of the laws of Ohio in force at the time when the act of Congress was passed as an extention of the Ohio Canal, which was then being constructed. (Page 9, Record in Walsh case, 316).

III.

It was also contended in the Courts below, and that contention has been repeated here, that the proviso relied upon applies only so long as the said canal *may be used*, and that when the state ceased to *use* the canal in question the requirement relied upon ceased to operate.

This contention is based on the following language of said proviso, to-wit: "Provided, the said canals, when completed *or used*, shall be, and forever remain," etc.

The proper construction of this language is manifest, and such construction does not allow the contention under consideration. By the language "completed or used" it was intended to provide that the requirement in question should commence to operate the moment the canal was completed, or, not being wholly completed, should commence to be used.

In other words, the language "completed or used" had relation to the time when the requirement should commence to operate and not to the time when it should cease to operate, and the addition of the words "or used" after the word "completed" was intended to provide for an earlier operation of the requirement in the case of use before completion than was provided for by the word "completed."

IV.

Coming now to the question of abandonment, our contention is not that canals are constructed for the benefit of the lessees of water leases and privileges, and that the state must maintain them on account of such interests. On the contrary, we admit this canal was constructed for highway purposes, and we further admit that water privileges are only an incident of the canal, and we also admit that the state has a right, whenever it may see fit to do so, to abandon the canal, and that in case of such abandonment the owners of water rights and privileges are without redress for whatever injury they may sustain.

We not only concede these propositions, but we also agree with the authorities cited on this point by counsel for the defendant in error. But what we contend is, that while the state has a right to abandon a canal, it must abandon it in a lawful manner—its act of abandonment must be valid—and until it does validly abandon there is no abandonment in law, and those having water rights and privileges have a right to complain and invoke the power of the Courts for their protection.

The cases of

Fox v. *Cincinnati*, 104 U. S., 783,
Hubbard v. *Toledo*, 21 O. S., 379,
Malone v. *Toledo*, 28 O. S., 643,

and all the other cases cited by counsel for defendant in error to the same point are without application to this particular case, for the reason that in all those cases there was no question, as there is here, about the validity of the act of abandonment. On the contrary, in all those cases it was conceded that there had been abandonment, the validity of which was not called in question, and the only controversy was, conceding abandonment, as to whether or not the owners of water rights and privileges had a right to complain, and no Court in any one of those cases went any further than to hold that, conceding there had been abandonment, owners of water rights and privileges had no right of action.

It is elementary that if a law is, in its nature, a contract, and rights have become established thereunder, it can not be repealed.

Fletcher v. *Peck*, 6 Cranch., page 86.

In 1831 this state passed an act proposing, with the assent of Congress, to take under its care that portion of the Cumberland road within its limits, and to apply the tolls to the repair of the road, and containing a proviso exempting toll for the passage of any stage or coach conveying the property of the United States and persons in its service. Congress passed a law assenting to this act.

In 1831, Pennsylvania, about two months after the passage of the law of Ohio, passed a similar act.

In 1836, the Legislature of Pennsylvania passed an act imposing a toll upon carriages carrying the mail of the United States over that part of the Cumberland road within the state. The Court held this act to be in conflict with the compact between the state and the United States under which the state took possession of the road. To same effect, *McGhee* v. *Mathis*, 4 Wall., 145; *Lake Superior R. R. Co.* v. *United States*, 3 Otto, 442; *Green* v. *Biddle*, 8 Wheaton, 1.

A contract of a state with another state or with an individual, whether it assumes the form of a grant or not, is a contract within the prohibition of the Constitution of the United States. *New Jersey* v. *Wilson*, 7 Cranch., 164; *Fletcher* v. *Peck*, 6 Cranch., 87; *Providence Bank* v. *Billings*, 4 Pet., 560; *Woodruff* v. *Trapnall*, 10 How., 190; *Wabash, etc., Co.* v. *Beers*, 2 Black, 448.

The constitutional inhibition against impairment of contractual obligations applies to every contract which a state law can affect. A contract between two states, or a contract between a state and an individual, or a contract between a state and the United States, is a contract within the sense of this clause, and its inviolability will be protected.

The action of the defendant in error authorized by the act of the General Assembly of Ohio, passed May 18th, 1894, will, if allowed, disturb the rights of plaintiffs in error, which are vested rights, secured by contract, in the enjoyment of which they are entitled to protection until there is a valid termination of the compact between the United States and the state of Ohio.

V.

The contention of counsel for defendant in error that the plaintiffs in error are without relief because not parties to the contract between the United States and the state of Ohio is not tenable, because the contract in question is the contract of all the citizens of the state of Ohio, made on their behalf by the state, acting in its sovereign capacity as their agent. The contract in question is not to be likened to an agreement between individuals as to their individual rights, nor to a contract between individuals for the benefit of third parties. In this case the contract is between sovereignties, and sovereignties acting only as agencies.

The plaintiffs in error are not therefore merely beneficiaries, but they are more than this. They are principals for whom the intangible power of sovereignty has acted as their agency. Their proper relation to the contract appears when it is recalled that governments are created for the benefit of the people. What these agencies of the people do they do for the people, and in the name of the people, and their contracts are the contracts of the people. This is not therefore a case where the plaintiffs in error have an interest in a contract between other parties, to which contract the plaintiffs in error are strangers, but a case where the contract is their own contract, made in their name and by their authority—by their governmental agency—and therefore a contract to which they are directly related, and upon the provisions of which they have a right to rely.

It is true that the contract made by the state acting in its statal capacity might also be abandoned by the state, so acting, without any express consent or direction from the people of the state, because the powers delegated to the state government when it was established included such right and authority ; but this fact does not contravene the proposition that the people of the state are still the real parties to the contract, nor does it dispense with the necessity in this instance of the state securing the consent of the United States to an abandonment of the contract as a condition precedent to its act of abandonment, nor preclude those who have acted, as the plaintiffs in error have, upon the faith of a full performance of the contract, or a lawful abandonment of the same, insisting upon such performance, or such consent or agreement

on the part of the United States as may be essential to the validity of abandonment by the state.

VI.

The act of the General Assembly of the state of Ohio, passed May 18th, 1894, was invalid for the further reason that the act of the Legislature of Ohio undertook to grant a greater title in the "Hocking Canal" to the railroad than the state of Ohio possessed.

The title to the state of Ohio in that part of the Hocking Canal between Carroll and Lancaster is not a title in fee simple, as is the title to the remainder of the canal property of Ohio, including the remaining portions of the Hocking Canal beyond Lancaster, but simply an easement for canal purposes.

The state of Ohio came into possession of that part of the Hocking Canal which lies between Carroll and Lancaster by purchase from the Lancaster Lateral Canal Company, a private corporation, which constructed the canal under the authority of its charter as received from the Ohio Legislature.

The state of Ohio, under an act entitled "An act to provide for the general improvement of the state of Ohio by navigable canals." passed February 4th, 1825 (See 2 Chase, page 1475, section 8), constructed the general canal system of the state, and under said act had authority to take land by purchase or gift, and also to appropriate land that was necessary in the construction and maintenance of said canal system. The title to all land appropriated under this act which vested in the state of Ohio, was expressly provided by that statute to be a fee simple title.

But the title which the state of Ohio acquired in that part of the Hocking Canal which lies between Carroll and Lancaster, is an entirely different title from that which it acquired in lands appropriated under the general canal act of 1825. (See volume 24, Ohio Laws, 71). By its act of incorporation, the Lancaster Lateral Canal Company was constituted and declared a body corporate and politic "for the purpose of making a navigable canal from the town of Lancaster to such point of the Ohio Canal as shall be found most eligible."

Afterwards, to-wit: March 9, 1838, by authority of an act entitled "An act to authorize the Board of Public Works to pur-

chase for the use of the state of Ohio, the Lancaster Lateral Canal," said Lancaster Lateral Canal was purchased by the state of Ohio, and, thereupon, became in fact and in law a part and parcel of what is now known as the Hocking Canal, and is embraced in the act of abandonment in question.

The act of incorporation of the Lancaster Lateral Canal Company specially provided that the title which this company should have in lands which they appropriated for the purpose of constructing their canal should be "to the extent and for the purpose set forth in or contemplated by this act."

The Supreme Court of Ohio held in this case upon the facts shown in this Record, that the title of the Lancaster Lateral Canal Company was not in fee simple, but only an easement (page 39, Walsh Record), and that Court also held in the same case that the state of Ohio took from the Lateral Company only an easement; and that in the case of abandonment by either the Lateral Company or the state the lands would have reverted, but undertook to avoid the consequences of this view by holding that there was not an abandonment, but only a change in the nature of the highway to which the use of the property was to be subjected. (Pages 39 and 40, Walsh Record).

This holding does not change the fact that the state, by the act of May 18th, 1894, undertook to grant a greater title than it had in this property, and, if so, the grant in this case, as in any other, must for that reason be held to be void.

Where the state makes a grant and purports to give a greater title than it possesses, the grant is void. This doctrine prevailed at common law by which grants from the Crown could be avoided in three ways, the first of which was where the grant professes to give a greater estate than it (the Crown) possessed in the subject matter of the grant.

Am. & Eng. Ency. of Law, Vol. 9, page 45, "Grants."

Public grants are to be construed strictly, not extended by implication. *Jackson* v. *Lamphire*, 3 Pet., 280; *Beaty* v. *Knowler*, 4 Pet., 152; *Providence Bank* v. *Billings*, 4 Pet., 514.

Respectfully submitted,

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April 6, 1899.